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NO. 45574-9-II
(45710-5)

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

ALEXANDRINA VAN GINNEKEN

Plaintiff

v.

MARINUS VAN GINNEKEN

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR¹

1. Supplemental Assignments of Error

1. The trial court committed error when it concluded that RAP 7.2 did not apply to the entry of Ms. Van Ginneken's Findings of Fact and Conclusions of Law and Order on Show Cause Granting Partial Relief from Judgment via CR 60.

2. The trial court committed error entering an Order on Show Cause granting partial relief from judgment via CR 60 as follows:

- i. Finding 1.3 that Marinus controlled all of the family finances.
- ii. Finding 1.4 that Ms. Van Ginneken technically had access to the funds, but did not have actual, in reality, access to the funds.
- iii. Finding 1.7 that Marinus was benefiting from the Property settlement Agreement (hereafter referred to as "PSA") and the living arrangements.

¹ The Opening brief filed on January 21, 2014, prior to consolidation, addressed the Assignment of Errors for Lewis County Superior Court Cause No. 12-2-01220-1 (Petition for Partition Trial) and are not specifically addressed in this Supplemental Opening Brief which addresses Assignment of Errors for Lewis County Superior Court Cause No. 07-3-00472-8 (Motion to Vacate). References to Clerk's Papers in this Supplemental Opening Brief refers to the Clerk's Papers filed under Lewis County Superior Court Cause No. 07-3-00472-8 unless it references otherwise. The Consolidated Verbatim Report provides consistent page references throughout the Opening Brief and Supplemental Opening Brief.

- iv. Finding 1.9 that it is difficult to believe that after this length of marriage that the only thing they had left was \$43,000.00 to split.
- v. Finding 1.10 that Mr. Van Ginneken knew Ms. Van Ginneken sought a mental health evaluation and sought treatment.

3. The trial court committed error when it vacated the PSA concluding in the Findings of Fact and Conclusions of Law and Order on Show Cause Granting Partial Relief from Judgment via CR 60 that the PSA appears it may not be fair and equitable.

4. The trial court committed error when it vacated the PSA concluding in the Findings of Fact and Conclusions of Law and Order on Show Cause Granting Partial Relief from Judgment via CR 60 that the PSA appears it may not be free from undue influence.

2. Supplemental Issues Pertaining to Assignment of Error.²

1. Was Ms. Van Ginneken required to file a motion with the Court of Appeals, pursuant to RAP 7.2, after the Court of Appeals had accepted review of the trial court's dismissal of the Petition to Partition in Lewis County Superior Court Cause No. 12-2-01220-1 and before the

² Appellant briefed the portion of the appeal, prior to the consolidation, regarding the trial court's dismissal of the Petition on Partition filed by Ms. Van Ginneken to enforce the property settlement agreement. Appellant's supplemental statement of the case addresses errors by the trial court entering the Order on the Motion to Vacate.

court entered Findings of Fact and Conclusions of Law and Order on Show Cause Granting Partial Relief from Judgment via CR 60 in Lewis County Superior Court Cause No. 07-3-00472-8?

II. SUPPLEMENTAL STATEMENT OF THE CASE

1. Supplemental Statement of Facts.

The Appellant, Marinus Van Ginneken, (hereafter Marinus) and Plaintiff, Alexandrina Van Ginneken, (hereafter Ms. Van Ginneken) were married on November 8, 1961. (CP 12). In the fall of 2006, the parties sold their home in Texas to move to Washington State. (RP at 20). The parties deposited the funds from the sale of the Texas home, approximately \$202,912.95, in an account accruing greater than 4% interest. (CP 21). The parties began residing with their son in Renton, WA. (RP at 21). Ms. Van Ginneken claims to have been hospitalized due to an emotional breakdown (CP 18); however, no evidence has been presented in any cause of action to indicate such emotional breakdown or hospitalization. (RP at 105).

On February 19, 2007, Ms. Van Ginneken signed a special power of attorney to allow Marinus to travel to Rochester, WA and purchase their new family home. (RP at 50). On March 19, 2007, the parties purchased the family home with community funds, approximately \$170,000.00. (CP 22). The parties moved into the home shortly after and Ms. Van Ginneken still resides in the home.

The parties separated on December 15, 2007 after forty-six (46) years of marriage. (CP 12). The parties negotiated a PSA which was filed on June 11, 2008. (CP 8).

Ms. Van Ginneken was advised of her right to have an attorney. (RP at 153). Ms. Van Ginneken signed the PSA and, pursuant to the terms of that agreement, executed a Quit Claim Deed converting the family home from tenants in common to a Joint Tenancy with the Right of Survivorship. (CP 22). Ms. Van Ginneken had family present at the signing of the PSA and Quit Claim Deed. (RP at 83).

The fully executed PSA was filed on June 11, 2008. (CP 8). The parties' marriage was dissolved by way of Decree of Dissolution on June 20, 2008. (CP 12). The Quit Claim Deed conveying the property to the parties as joint tenants with right of survivorship was recorded on June 27, 2008. (CP 22).

The parties resided together following the entry of the Decree of Dissolution until December 2008. (CP 22). During cohabitation following the dissolution, the parties shared all expenses relating to the family home by paying for the expenses using joint accounts. (CP 22). The PSA states the parties are to share equally "one-half of all debt related to the family home located at 428 Manners Road, Rochester, WA 98579" including the

mortgage, taxes and insurance, repairs, and any other reasonable debts related to ownership of said property. (CP 8).

Marinus argues he was forcibly removed from the home in December 2008. (CP 22). The parties maintained joint banking accounts until approximately September 2011. (CP 22). Marinus had his Dutch and Canadian pensions deposited in the joint account. (CP 22). Ms. Van Ginneken had her Dutch and Canadian pensions deposited in the joint accounts. (CP 22). Marinus paid all expenses and costs associated with the family home with the joint accounts. (CP 28). Ms. Van Ginneken had access to the accounts at all times. (RP at 154).

In September 2011, Ms. Van Ginneken established a new bank account and had her Canadian pension diverted to the newly established account. (CP 22). In February 2013, Ms. Van Ginneken had her other pension diverted from the joint bank accounts. (CP 22). Marinus continued paying all expenses and costs associated with the family home with his pensions alone. (CP 28) Ms. Van Ginneken still resides in the family home with her daughter, Leona McCray, son-in-law and grand-daughter. (RP at 60).

2. Procedural History.

On December 14, 2007, Marinus filed a Petition to dissolve his marriage with Ms. Van Ginneken under Lewis County Superior Court Cause No. 07-3-00472-8. (CP 1).

On June 11, 2008, the parties filed the PSA under Lewis County Superior Court Cause No. 07-3-00472-8. (CP 8).

On June 20, 2008, the parties dissolved their marriage via an agreed Decree of Dissolution in Lewis County Superior Court Cause No. 07-3-00472-8. (CP 12).

On June 26, 2008, the Quit Claim Deed dated June 10, 2008 was recorded under Lewis County Auditor Number 3308911. (Trial CP 18).

On October 12, 2012, Ms. Van Ginneken filed a Complaint for Partition of the family home and to enforce the PSA. This cause of action was filed under new Lewis County Superior Court Cause No 12-2-01220-1 rather than under the original cause number. (CP 28).

On October 3, 2013, a scheduled two-day trial was commenced. After Ms. Van Ginneken rested her case, Honorable Lewis County Superior Court Judge Nelson E. Hunt dismissed the case sua sponte from the bench. The court found the parties had failed to dispose of their property, making the PSA “completely void.” (RP 132).

On October 18, 2013, an Order of Dismissal was entered by Judge Hunt. (CP 28).

On October 22, 2013, Marinus filed a Motion for Reconsideration and Memorandum of Law Re: Motion for Reconsideration. (CP 22).

On October 28, 2013, without a hearing or response from Ms. Van Ginneken, Judge Hunt denied Marinus' Motion for Reconsideration stating "the real property division was not properly determined by creating a joint tenancy with the right of survivorship and that there are significant questions regarding the equitable division of the property division. . . ." (CP 22).

On October 30, 2013, Ms. Van Ginneken filed a Motion to vacate the PSA. (CP 18).

On November 13, 2013, Marinus filed a Notice of Appeal of Judge Nelson E. Hunt's Order dismissing Ms. Van Ginneken's Petition for Partition action under Lewis County Superior Court Cause No. 12-2-01220-1. (CP 22).

On November 15, 2013, Judge Hunt heard argument regarding the Motion to Vacate the Property Settlement Agreement. (CP 24).

On December 10, 2013, Judge Hunt heard argument on presentation of the Findings of Fact and Conclusions of Law (CP 27) and

entered the Findings of Fact and Conclusions of Law regarding the CR 60 motion.. (CP 28).

On December 18, 2013, Marinus filed a Notice of Appeal of the Order on Show Cause under cause #07-3-00472-8. (CP 29).

On December 18, 2013, Marinus filed a Motion to Consolidate this appeal with the appeal from Judge Hunt's order to dismiss the Petition for Partition trial under Lewis County Superior Court Cause No. 12-2-01220-1 and Court of Appeals Division II Cause No. 45574-9.

On January 21, 2014, Marinus filed an Opening Brief under Court of Appeals Division II Cause No. 45574-9. A response by Ms. Van Ginneken was not received or filed.

On February 19, 2014, the court appeals granted the consolidation of the two cases; Lewis County Superior Court Cause No. 12-2-01220-1 and Court of Appeals Division II Cause No. 45574-9 with Lewis County Superior Court Cause No. 07-3-00472-8 and Court of Appeals Division II Cause No. 45710-5. The appeals were consolidated under Court of Appeals Division II Cause No. 45574-9.

III. ARGUMENT

The Court of Appeals reviews a trial court's decision on a Motion to Vacate using the abuse of discretion standard. *In re Dependency of M.D.*, 110 Wn.App. 524, 530, 42 P.3d 424 (2002). A trial court abuses its

discretion if it bases its decision on an incorrect legal standard or the facts do not meet the requirements of the standard. *In re Marriage of Lawrence*, 105 Wn.App. 683, 686 n. 1, 20 P.3d 972 (2001). See, *In re J.N.*, 123 Wn. App. 564, 570, 95 P.3d 414, 417 (2004).

1. Was Ms. Van Ginneken required to file a motion seeking permission with the Court of Appeals prior to entry of the Findings of Fact and Conclusions of Law by the Trial Court, pursuant to RAP 7.2(e)?

The issue on appeal from the Petition for Partition trial is whether the PSA is void and whether the court should have dismissed the trial after Ms. Van Ginneken rested. Those issues were addressed in the Opening Brief. The issue on appeal from the Order to Vacate the PSA is whether the trial court should have vacated the PSA without Ms. Van Ginneken seeking leave of the Court of Appeals as required pursuant to RAP 7.2(e).

Marinus contends that Ms. Van Ginneken was required to file a motion with the Court of Appeals, pursuant to RAP 7.2, after the Court of Appeals accepted review of the trial court's dismissal of the Petition to Partition in Lewis County Superior Court Cause No. 12-2-01220-1 and before the court entered the Order on Show Cause Granting Partial Relief from Judgment via CR 60 in Lewis County Superior Court Cause No. 07-3-00472-8. Once the Appellate Court has accepted review, pursuant to RAP

6.1, the trial court's ability to rule on postjudgment motions is limited by RAP 7.2(e) which states, in part:

If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. . . .

RAP 7.2(e).

Whether a trial court violates RAP 7.2(e) turns on whether the subsequently entered order or judgment affects the outcome of any issues accepted for review. *State ex rel. Shafer v. Bloomer*, 94 Wn.App. 246, 250, 973 P.2d 1062 (1999).

The issue in the first appeal filed was whether the PSA is "completely void" and whether the court should have dismissed the case after Ms. Van Ginneken rested. The issue in the second appeal, consolidated, is whether the court should have vacated the PSA without leave of the Court of Appeals pursuant to RAP 7.2(e). There is technically no PSA for the Court of Appeals to consider after the trial court vacated it, thus leaving the first appeal issue moot.

The Court has interpreted RAP 7.2 to apply to cases where the trial court is inclined to grant the postjudgment motion. "Thus, a postjudgment motion is presented to the appellate court only if the trial court is inclined to

grant the motion and grant of the motion will affect the decision under review.” *Alpine Indus., Inc. v. Gohl*, 101 Wn. 2d 252, 256, 676 P.2d 488 (1984). The issue before the trial court on the Motion to Vacate was whether to vacate the PSA which the trial court determined to be “completely void” and send the parties back to “square one”, or allow the Court of Appeals to make a decision whether the trial court was correct that the PSA was “completely void.” The trial court would never hear a Motion to Vacate if the Court of Appeals finds the PSA is a valid disposal of property.

The Motion to Vacate alters the decision before the Court of Appeals. The Motion to Vacate potentially changes the offsets, changes the financial relationships, and changes the obligations of the parties. In addition, issues of fairness, fraud, and misrepresentation were never pled in the Petition for Partition trial, only through Ms. Van Ginneken’s Motion to Vacate the PSA. In fact, Ms. Van Ginneken and her attorney only sought to enforce the PSA. (RP at 17, 18, 91, 93, and 123). The issues regarding fairness, fraud, and misrepresentation should not be considered by the Court of Appeals with respect to the issues before the court related to the Petition for Partition trial because it was not plead or argued, and in

fact it was abandoned by Ms. Van Ginneken. (RP at 25).³

The Court of Appeals should vacate the CR 60 Order granting relief from the PSA, find the PSA is valid, and remand back to the trial court for Marinus to present his case during the second day of trial.

2. Did the Court err in making Findings of Fact and granting Partial Relief from Judgment via CR 60 without substantial evidence?

An appellate court will not disturb findings of fact supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The party challenging a finding of fact bears the burden of showing that it is not supported by the record. *Brin v. Stutzman*, 89 Wn.App 809, 824, 951 P.2d 291 (1998). Substantial evidence is that quantum of evidence sufficient to convince a rational and fair-minded person of the truth of the premise it is offered to support. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,819, 828 P.2d 549 (1992). An unchallenged finding of fact is treated as a verity on appeal. *Cowiche*, 118 Wn.2d at 808, 828 P.2d 549 (citing *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 818, 792 P.2d 500 (1990)).

³ An issue, theory, argument or claim of error not presented to the trial court will generally not be reviewed by the Court of Appeals. *Lindblad v. Boeing Co.*, 108 Wn.App. 198, 206, 31 P.3d 1 (2001). A reviewing court may consider an issue, theory or argument if the record reveals that the issue was presented to the trial court, and the trial court was both aware of and had an opportunity to consider it. *Washburn v. Beatt Equipment Co.* 120 Wn.2d 246, 885, 840 P.2d 860, (1992). *reconsideration denied*. When the issue was raised, Ms. Van Ginneken's counsel stated they were not pursuing the issue.

a. Finding 1.3 that Marinus controlled all of the family finances.

The court, based on the trial testimony from the Partition action together with the pleadings in the Motion to Vacate, found that Marinus controlled all of the family finances. (CP 28). Although the court considered testimony at trial to make the finding, the court failed to consider that Ms. Van Ginneken admitted that she would deposit funds into the account while the parties were married and withhold cash money for groceries and other expenses. (RP at 5) and (RP at 19). Additionally, the court considered testimony from only one half of the trial, since Mr. Van Ginneken was denied his opportunity to present his case or any evidence.

Having said that, even considering only Ms. Van Ginneken's evidence, it still does not constitute substantial evidence supporting the trial court's finding. Marinus admits that he paid the bills on Sundays by writing checks. (RP at 19). Ms. Van Ginneken knew of her pensions during marriage and the amounts being deposited. (RP at 119) She also knew that Marinus was paying expenses with both of their pensions. (RP at 102). In September 2011, Ms. Van Ginneken opened new accounts and diverted her pension to those new accounts. (RP at 71-72). For five years

after the entry of the PSA, Ms. Van Ginneken never objected to the relationship.

b. Finding 1.4 that Ms. Van Ginneken technically had access to the funds, but did not have actual, in reality, access to the funds.

No evidence has been presented, with the exception of a self-serving declaration from Ms. Van Ginneken, indicating Ms. Van Ginneken did not have access to the joint bank accounts, to support this finding. The trial court relied upon testimony at trial to find Ms. Van Ginneken technically had access to the funds, but did not have actual, in reality, access to the funds. (CP 28). Ms. Van Ginneken deposited funds into their joint accounts during marriage and withdrew cash from those accounts. (RP at 5, RP at 19). At all times during the marriage and after the parties were divorced, Ms. Van Ginneken had full knowledge of and full access to all the accounts.

c. Finding 1.7 that Marinus was benefiting from the PSA and the living arrangements.

There is no evidence presented that Marinus ultimately benefited from the PSA. The trial court stated, “I agree with Mr. Williams 100 percent on this based on what I know or think I know about this case, and that is this was all of his making, he was benefiting from it.” (RP at 154). The court considered one side of the story; Ms. Van Ginneken’s case.

It is true that Marinus had not paid an equalization payment from the PSA in the amount of \$22,542.50, (CP 22); however, he contributed more money to the family home expenses than was required of him via the P S A. (CP 22) (CP 28). Marinus argued in his Trial Memorandum (Trial CP 10) that Ms. Van Ginneken should have been responsible for \$53,415.85 of the expenses; however, based on her contributions she only contributed \$36,381.62. It was Mr. Van Ginneken that covered Ms. Van Ginneken's \$21,024.48 shortfall and it is that amount Mr. Van Ginneken is asking for by way of a credit/offset. (Trial CP 10). However, the court never considered the evidence of Marinus' pension deposits and the expenses of the parties.

d. Finding 1.9 that it is difficult to believe that after this length of marriage the only thing they had left was \$43,000.00 to split.

The court made a finding that it is hard to believe the parties had no more than \$43,000.00 to share at the end of the marriage. (CP 28). The court failed to consider the plethora of bank statements provided by Marinus that evidenced the parties' bank accounts and balances. (CP 21). Ms. Van Ginneken claims Marinus did not disclose all funds at the time the Decree was entered but provides no evidence to support this claim. (CP 17). On October 18, 2006, \$200,000.00 was direct deposited into account number

xxxxxxxxxx745-0 which was proceeds from the sale of the Texas home. (CP 22).

On March 19, 2007, approximately \$170,000.00 was withdrawn and used towards the purchase of the Rochester property in which the respondent is currently residing. (CP 22) During this period of time (October 18, 2006 through March 19, 2007), the parties accrued \$2,913.01 in interest off of the \$200,000.00 in account no. 7450. (CP 22).

These transactions all occurred during the course of the parties' marriage and Ms. Van Ginneken is listed on this account during this time period. (CP 21) (CP 22). On February 22, 2008, the account was closed, with a balance of \$39,676.10 and account no. 8472 was opened. (CP 21) (CP 22). These funds were transferred to acct. no. 8472, with a beginning balance of \$48,561.49. (CP 21) (CP 22). During the period between February, 2008 and June, 2008, \$1,900.00 was withdrawn for household expenses (Mr. Van Ginneken was living in the family residence during this time). (CP 21) (CP 22). In addition, \$3,000.00 was withdrawn for legal expenses by Mr. Van Ginneken. (CP 21) (CP 22).

At the time of the entry of the PSA, the amount remaining in account no. 7450 (which in actuality was now account no. 8472) was awarded to Mr. Van Ginneken. (CP 21) (CP 22). The remaining balance in this account was \$43,995.21, which included YTD interest in the amount of \$430.89 – thus,

the provision was entered ordering an equalizing payment of community monies in the amount of \$22,542.50 (while the math was not exact and should have actually been \$21,997.605, I believe there is a reasonable understanding of this equalizing payment). (CP 21) (CP 22).

Ms. Van Ginneken has provided no evidence to the contrary except for self-serving declarations. The trial court failed to rely on substantial evidence to make the finding that “it’s difficult to believe that after this length of marriage that the only thing they had left was \$43,000.00 to split.” To the contrary, substantial evidence supports a finding that the parties shared equally in the accounts remaining funds and a full analysis in Marinus’ trial brief (Trial CP 10) clearly outlines the incomes and expenses of the parties. The evidence shows that Marinus’ contributed far more than the 50% required under the terms of the PSA.

e. Finding 1.10 that Mr. Van Ginneken knew Ms. Van Ginneken sought a mental health evaluation and sought treatment.

Substantial evidence was not provided evidencing Ms. Van Ginneken was committed for a mental health evaluation or that she sought treatment. The trial court relied on testimony and pleadings during the Partition Trial to reach the conclusion that there was substantial evidence to support this finding. (RP at 154). No information was presented at trial to indicate Ms. Van Ginneken was involuntarily or voluntarily committed;

however, the trial court stated Marinus “knows that she was involuntarily committed for mental health issue due to this arrangement” (RP at 150) (RP at 158).

Ms. Van Ginneken sought to enforce the PSA and at no time sought anything other than enforcement at trial. At trial, Ms. Van Ginneken states she “was mental hospitalized for a little while;” (RP at 105), prior to the purchase of the Rochester home. There is no allegation that Ms. Van Ginneken had mental health issues when the home was purchased or any time after the home was purchased, and most importantly, there was never any allegation that she was suffering from any mental health issues when she signed the PSA and quit claim deed.

Marinus stated at trial that he never even met with a doctor regarding the alleged hospitalization or evaluation. (RP at 25). Ms. Van Ginneken never had any information admitted as evidence regarding such evaluation or hospitalization.

3. The trial court committed error when it vacated the PSA concluding the PSA appears it may not be fair and equitable and may not be free from undue influence.

Conclusions of law are reviewed de novo to determine if they are supported by the findings of fact. *Bingham v. Lechner*, 111 Wn.App 118, 127, 45 P.3d 562 (2002) *review denied*, 149 Wn.2d 1018, 72 P.3d 761 (2003). A reviewing court may look to the trial court’s oral ruling to

interpret findings of fact and conclusions of law. *State v. Hescock*, 98 Wn.App 600, 606, 989 P.2d 1251(1999); *State v. Bynum*, 76 Wn.App 262, 266, 884 P.2d 10 (1994).

An assignment of error as to a conclusion of law does not challenge or bring for review the underlying findings on which the conclusion is based. *Le Cocq Motors, Inc. v. Whatcom County*, 4 Wn.2d 601, 603, 104 P.2d 475 (1940); *West Coast Airlines, Inc. v. Miner's Aircraft and Engine Service, Inc.*, 66 Wn.2d 513, 517-18, 403 P.2d 833 (1965); *English (J.D.) Steel Co. v. Tacoma School Dist.*, 57 Wn.2d 502, 504, 358 P.2d 319 (1961).

a. The Trial Court erred in concluding the PSA appears it may not be fair and equitable.

The court erred by concluding the PSA appears it may not be fair and equitable. (CP 28). First, the court relied on testimony presented at trial without having heard Marinus' case because the trial court dismissed the trial after Ms. Van Ginneken rested her case. (RP at 153). Marinus' testimony would likely have included eighty (80) ER 904 exhibits detailing the parties' finances. However, ruling on the Motion to Vacate, the trial court stated, "I've only heard half of it, but the interesting thing about that, I'm not sure I would have heard any evidence in the partition action, because whether the PSA was void or voidable was not the issue."

(RP at 153). At trial the court dismissed the case stating, “so I took a look at some case law and found out that's exactly right and that it is not just voidable but void, completely void.” (RP at 132). Even more concerning is the trial court denying Marinus’ Motion for Reconsideration stating, “there are significant questions regarding the equitable division of the property division.” (Trial CP 19). The trial court makes multiple inconsistent statements for dismissing the trial.

The trial court appeared to be convinced the parties had more money after dissolution than the \$43,000.00 that was divided via the PSA. (CP 28). The bank statements provide evidence that the parties sold their Texas home in 2006, deposited over \$200,000.00 into a joint account, and used the money to purchase the Rochester, WA home in 2007. (CP 22). The money accrued interest while it was in the joint account at a rate of approximately 4.35%. (CP 21). The trial court did not consider this information or the fact that the parties purchased the home in Rochester for approximately \$170,000.00.

Ms. Van Ginneken introduced a 2007 Form 1099 at trial (Trial RP 87) (Exhibits 89 and 89) evidencing interest from their joint account and concluded Marinus must have not disclosed the funds from which the interest was calculated. Ms. Van Ginneken failed to consider the interest on the 2007 Form 1099 was from the funds deposited into the account

from the sale of the Texas home in 2006. The funds were not in the account at the time the parties dissolved their marriage because they were distributed from the account to purchase the Rochester, WA home in 2007.

The parties operated under this PSA for five (5) years prior to Ms. Van Ginneken seeking to sell the home and collect the equalization payment. During this time, Ms. Van Ginneken allowed Marinus to pay all the expenses associated with the family home. In 2011, Ms. Van Ginneken diverted her Canadian Pension funds from the joint account. (RP at 9, 37, 62 and 71). Marinus continued to pay all the expenses from the joint account with his pensions, minus Ms. Van Ginneken's Canadian Pension contribution. Ms. Van Ginneken then diverted her Dutch Pension from the Joint Account in 2013. (RP at 9, 37, 71). Marinus continued to pay all the expenses from the joint account with his pensions, minus Ms. Van Ginneken's Canadian and Dutch pensions. (Trial CP 10).

The trial court failed to consider the numerous offsets proposed by Marinus. (Trial CP 10). Ultimately, Marinus did not benefit from the PSA or the arrangement of the parties which is summarized in Marinus' Trial Memorandum. (Trial CP 10). The PSA was fair and equitable.

b. The PSA appears it may not be free of undue influence.

The trial court considered only Ms. Van Ginneken's evidence in the Partition trial. Marinus was unable to present additional testimony or evidence, including testimony of people present at the signing of the PSA and Quit Claim Deed. Ms. Van Ginneken accuses staff for Marinus' former attorney of forcing her signature, but the court did not allow Marinus to present rebuttal testimony.

Ms. Van Ginneken signed the PSA with a clause advising her of her right to seek counsel. (CP 8). The trial court stated, "I'm not going to get into whether there was some legal ethical obligation that was overstepped here because of Ms. Van Ginneken not being represented. There is a clause in the PSA that advises her that she has the opportunity to seek legal counsel if she wants." (RP at 153). In addition, Ms. Van Ginneken had her daughter present at the signing of the PSA and the Quit Claim Deed to advise Ms. Van Ginneken. (RP at 83).

Ms. Van Ginneken claims that she was "hospitalized" for mental issues; however, there was no evidence of any voluntary or involuntary hospitalization. (RP at 105). There is no argument by Ms. Van Ginneken that she had mental health issues after the purchase of the home or when signing the PSA and Quitclaim Deed.

Ms. Van Ginneken signed the PSA attesting it is a just and equitable division of property. (CP 8). Ms. Van Ginneken signed the PSA

attesting it was a free and voluntary agreement. (CP 8). Ms. Van Ginneken had her daughter present throughout the signing. (RP at 83). The findings don't support a conclusion of undue influence; especially when the parties have generally operated under the Agreement for five (5) years.

IV. ATTORNEY FEES

Marinus should be awarded attorney fees on appeal. Marinus is asking the court to reverse the trial court's decision to vacate the parties' PSA. Ms. Van Ginneken did not move the Court of Appeals prior to the trial court entering an order vacating the PSA as is required pursuant to RAP 7.2(e).

Numerous decisions have held that where a statute or contract allows for the recovery of attorney fees at the trial court level the appeal court has inherent authority to award attorney fees. *Standing Rock Homeowners Association v. Misich*, 106 Wn.App. 231, 247, 23 P.3d 520 (2001); *Brandt v. Impero*, 1 Wn.App. 678, 683, 463 P.2d 197 (1969). In the present case, the award of fees are authorized via the PSA Section V(A), as well as RCW 26.09.140. Marinus is entitled under RAP 18.1 and pursuant to the PSA to an award of fees and costs on appeal.

V. CONCLUSION

On October 18, 2013, the trial court dismissed Ms. Van Ginneken's Petition for Partition trial after she rested and did not allow

Marinus to present his case. The court stated that the PSA Ms. Van Ginneken was trying to enforce was “completely void” because the parties did not dispose of their property. Ms. Van Ginneken did not plead or argue that the PSA was invalid for any reason.

On October 25, 2013, the trial court denied Marinus’ Motion for Reconsideration stating that “real property division was not properly determined” and “there are significant questions regarding the equitable division of the property.” Despite the fact that equitable division at the formation of the PSA had never been plead or argued and Marinus had not been allowed to present his case.

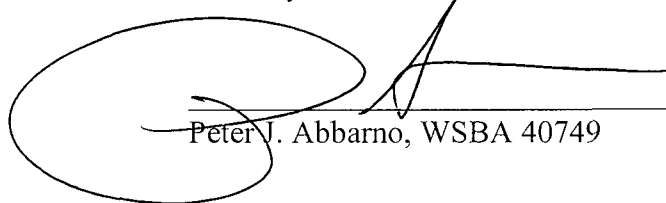
Marinus appealed the trial court’s decision by filing a Notice of Appeal on November 13, 2013. On November 15, 2013, the trial court heard argument on Ms. Van Ginneken’s motion to vacate the PSA. Marinus argued that RAP 7.2 applied and Ms. Van Ginneken would need to seek leave from the Court of Appeals to enter an order, the trial court and Ms. Van Ginneken disagreed and the trial court vacated the PSA. The Order was entered, including Findings of Fact and Conclusions of Law, on December 10, 2013. Marinus believes the court erred in finding that although the issue of the PSA was the same, RAP 7.2 does not apply where the cause numbers are different.

Marinus also believes the trial court erred by determining that there was substantial evidence to support the Findings of Fact. First, the court only heard one-half of the trial; Ms. Van Ginneken's half of the trial. Second, Ms. Van Ginneken filed no supporting documentation or evidence other than her self-serving declarations. Marinus supported his claims with substantial financial evidence.

Marinus is asking the court to find the parties disposed of their property and find the PSA is a valid agreement. The Court should vacate the Order to Show Cause, which vacates the PSA. Marinus should be allowed to present his case, free of the fairness claims brought five years after the fact which were never plead at trial. The parties agreed to keep the home, share in expenses, sell the home at a later time, and share in the profits. Ms. Van Ginneken's Petition for Partition requests that relief and the only issue before the trial court should be the calculation of the setoffs and the equalizing payment.

DATED this 11 day of April 2014.

OLSON ALTHAUSER
SAMUELSON & RAYAN, LLP
Attorneys for Marinus Van Ginneken



Peter J. Abbarno, WSBA 40749

CERTIFICATE OF SERVICE

I certify that on the 16th day of April 2014, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

Counsel for Plaintiff
Dana Williams
Williams and Johnson
57 West Main Street
Chehalis, WA 98532

() U.S. Mail
(X) Hand Delivery

By: 

Natalie Hellem, Legal Assistant
Olson Althausen Samuelson & Rayan, LLP

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